STATE OF MICHIGAN

COURT OF APPEALS

RODNEY URSERY,

Plaintiff-Appellant,

v

OPTION ONE MORTGAGE CORPORATION,

Defendant-Appellee.

UNPUBLISHED
July 31, 2007

No. 271560
Wayne Circuit Court
LC No. 04-427037-CK

Before: Wilder, P.J., and Sawyer and Davis, JJ.

DAVIS, J. (*concurring in part and dissenting in part*).

We are all in agreement that the trial court correctly dismissed parts of Count I and all of Counts III, IV, VI, and VIII of Ursery's complaint. However, I disagree with the reasoning, analysis, and conclusions set forth by the majority in several pertinent respects. The majority describes the gravamen of the underlying story as a mortgage loan default that resulted in a foreclosure. I respectfully disagree. I believe the gravamen of this case is that Ursery was never afforded a meaningful opportunity to be heard – either by the district court or by the circuit court – on his assertions that the default was at least partially caused by defendant. My principal concern is that Ursery did plead certain potential defenses and counterclaims. When they are combined with the documentary evidence before the trial court, viewed in the light most favorable to the nonmoving party and allowing for all legitimate inferences that could be drawn from his pleadings, they are sufficient to entitle him to a hearing on the merits and an opportunity to develop a full evidentiary record. Again, he was never afforded the opportunity to be meaningfully heard.

I first take issue with the majority's conclusion that the contract language recited in Section I(A)(1)(a) of the majority opinion constitutes an acceleration clause. In my view, it merely requires upon demand payment of principle and interest not paid to that point, plus other charges that may be required under the note or security agreement. It does not authorize acceleration of the entire mortgage balance. To the extent we differ on this analysis it would seem to me to present a strong argument for ambiguity in that language. I would also disagree with the notion that a default is triggered in this context if payments are not received on the first of each month when the contractual provisions then go on to repeatedly and explicitly provide a fifteen-day grace period after that due date; again, another ambiguity.

In Section I(A)(1)(b) of its opinion, the majority recites the language for "a strictly time-limited and conditional" right to reinstate the mortgage after an acceleration. We agree that the

right to reinstate exists under this agreement and that Ursery tried to avail himself of its provisions. It is at this juncture that most of the difficulty begins.

The majority asserts that defendant is entitled to summary disposition as to the entirety of Count I under MCR 2.116(C)(8) because plaintiff failed to allege that defendant actually received payments before the relevant dates. However, plaintiff *did* allege that defendant delayed posting payments in order to charge additional fees at paragraph 10 of the complaint. Although not explicitly stated, the implication is that defendant allegedly received payment before the relevant date.[1] We all agree that this *specific* assertion – that defendant deliberately delayed posting payments – fails under MCR 2.116(C)(10) because plaintiff failed to support it with evidence. However, the allegation in the complaint is nevertheless sufficient to constitute a *pleading* that defendant received payments before the date on which late fees could be charged. Summary disposition under MCR 2.116(C)(8) is therefore not warranted.

Regarding the late fees, the contractual due date for payment was by the end of the first calendar day of each month. Again, as noted above, late fees were chargeable at the *end of* fifteen days *after that*. Arithmetically, late payments would not be subject to a late fee until the *seventeenth* day of the month. Therefore, charging a late fee *on the sixteenth* day of the month would, by definition, be premature *no matter when* payment was actually received.

The majority contends that defendant was indisputably late in paying, which entitled defendant to foreclose even if it could not charge late fees; therefore, it does not matter whether defendant charged impermissible late fees. However, part of plaintiff's claim is that he was actually current in his payments at the time of foreclosure; and in any event defendant apparently did not foreclose on the basis of late payments, but rather because it concluded that plaintiff could not pay his outstanding accumulated arrearage.[2] The former constitutes a question of fact; the latter is particularly interesting because impermissible late fees would have affected how great plaintiff's alleged arrearage was. Moreover, plaintiff is in part seeking equitable relief on the basis of alleged misdeeds committed by defendant, one of which is breaching the terms of its own contract.

To be blunt, it is not clear from the documents provided by the parties exactly what transpired between them. If, as it appears, defendant was regularly charging late fees before they were technically due and otherwise letting matters go on as they were, it seems that there is, at least, some question whether defendant breached the contract based on the parties' course of

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[1] Plaintiff also more directly alleged that defendant charged late fees before they are due elsewhere in his complaint, at paragraphs 41, 44, and 46, although these allegations were located in Count IV, fraud and misrepresentation.

[2] Defendant states as much at page ten of its brief on appeal, asserting that it foreclosed because of plaintiff's delinquency in payment and resultant outstanding arrearage, and defendant "only foreclosed once it became clear [plaintiff] was unable to cure the default (and unable to even comply with the repayment plan)." This suggests that foreclosure was motivated by an absence of payment, rather than the timing of the payment, but at a minimum shows yet another unresolved factual question.

conduct. Therefore, there appears to be a genuine question of material fact regarding whether defendant breached the contract. Equity recognizes a legitimate defense of not permitting defendant to hold plaintiff to strict compliance with the contract if defendant was not itself strictly complying with the contract.

Regarding Count II, Ursery's count alleging an oral agreement, I first disagree with the majority's reliance on the statute of frauds, for the simple reason that no statute of frauds argument was made below, and no statute of frauds argument was made by any party on appeal. More importantly, the issue is whether there is a question of fact for the jury. Defendant concedes that it extended *some* kind of repayment plan to plaintiff, and defendant has provided a copy of a letter indicating that the repayment plan was pursuant to a telephone conversation on a date that would be consistent with Ursery's assertion of when the telephonic oral agreement was made. Although it is true that such an agreement should be in writing, the purpose of the statute of frauds is largely obviated by a concession that the agreement actually existed.

The majority observes that the letter referring to the conversation was not signed, and it also indicates that plaintiff must sign and return a form that allegedly was not, in fact, actually signed and returned. However, another letter states that defendant "has declared a breach for non-payment, under the terms of your signed repayment agreement," which suggests that the form was signed and returned. Furthermore, defendant concedes that plaintiff tendered the initial payment required under the repayment plan, and a letter indicates that at some point defendant demanded the second payment under the repayment plan. These facts show that defendant regarded the repayment plan as having gone into operation, and the documentary evidence reflects a genuine question of material fact whether the repayment plan entered into was in a written form.

Regarding Count IV, Ursery's claim for fraud and misrepresentation, I agree with the result reached by the majority. The majority contends that Ursery failed to plead fraud with the requisite level of specificity and that his complaint contains little more than conclusory assertions. However, my reasoning is different. One of the fundamental characteristics of fraud is that the plaintiff must actually have been misled by the defendant's falsehoods. But here, Ursery essentially alleges the opposite: that he actually knew that defendant's allegedly-false statements were false. I would affirm the dismissal of Count IV solely on the basis of Ursery's complete failure to plead an essential element and the fact that it would be impossible for him to amend his complaint to add that element without irreconcilable inconsistency with the rest of his claim.

In Count V, Ursery alleges that defendant violated the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. The majority engages in a lengthy analysis of the MCPA's exemption from applicability, under which it does not apply to transactions or conduct "specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." MCL 445.904(1)(a). I disagree with the majority's decision to do so for two reasons. First, it is incumbent on the party seeking to avail itself of the exception to show that the exception applies. MCL 445.904(4). Defendant merely stated, without any explanation, that under *Newton v West*, 262 Mich App 434; 686 NW2d 491 (2004), residential mortgage loan transactions are generally exempt. In fact, *Newton* only held that the particular savings bank in that case had been specifically authorized to make residential mortgage loans under applicable statutes. *Id*., 438-441. The *Newton* Court explicitly *declined* to

find a blanket exemption for "the banking industry as a whole," or an exception for anything other than the mortgage loan transactions that had been at issue in that case. *Id.*, 441. I do not believe defendant has satisfied its burden of proof, and I would not engage in any further analysis on that point.

More importantly, as our Supreme Court has recently explained, the exemption under MCL 445.904(1)(a) is an affirmative defense that is waived unless pleaded in a party's first responsive pleading or motion for summary disposition. *Liss v Lewiston-Richards, Inc*, 478 Mich 203, 208 n 13; ___ NW2d ___ (2007). Defendant simply asserted in its affirmative defenses that the MCPA "does not apply to the Defendant." This could arguably constitute raising the exemption found in MCL 445.904(1)(a), but only by affording to defendant's pleadings a generosity of construction that the majority deems inappropriate for plaintiff's pleadings. I believe that if plaintiff's pleadings should be held to relatively precise construction, so should defendant's pleadings.

Finally, the majority contends that this action constitutes and improper collateral attack on the district court proceedings and is barred by the doctrine of laches. I find this a mischaracterization of both the present and the prior proceedings, and I believe it is legally incorrect.

Laches is an equitable doctrine that applies where a party sits on his or her rights and fails to exercise due diligence long enough to cause some change in circumstances or some reliance by another party, which results in prejudice to that other party. *Gallagher v Keefe*, 232 Mich App 363, 369-370; 591 NW2d 297 (1998). Furthermore, laches is another affirmative defense that must be raised in a responsive motion or pleading, or it is waived. *Rowry v Univ of Michigan*, 441 Mich 1, 12; 490 NW2d 305 (1992). Laches is not listed in defendant's list of affirmative defenses, although defendant did assert that plaintiff "is barred from recovery as a result of his own wrongful or negligent conduct." Affirmative defenses may be amended, but I have found no indication that defendant did so to add laches at any time. I do not believe it is appropriate for this Court to raise, sua sponte, an affirmative defense that was waived by defendant. And again, as with the MCPA exemption, if this Court were to afford defendant's pleadings the generous leeway necessary to construe them as having raised the defense of laches, it would be fundamentally unfair not to grant plaintiff's pleadings the same wide latitude. Furthermore, this is another theory that was not raised below and was not argued on appeal.

In any event, laches would not apply to this case, because it entails *changed circumstances* on which the other party has reasonably relied, and the other party would be adversely affected if not permitted to continue relying on those changed circumstances. In *Jackson Investment Corp v Pittsfield Products, Inc*, 162 Mich App 750; 413 NW2d 99 (1987), the plaintiff in that case, in seeking to invalidate a foreclosure sale, did not bring suit until five months after the six-month redemption period had passed; this Court affirmed the trial court's finding that the equities of the case – specifically, application of the doctrine of laches – barred plaintiff from proceeding. *Id.*, 751-753, 756-757. A plain reading of *Jackson Investment Corp* reveals that the timing was at most a minor contributing factor. The highest bidder at the foreclosure sale "began paying insurance premiums, property taxes, and maintenance and utility expenses" immediately on receipt of the sheriff's deed on the date of the sale. *Id.*, 752. The plaintiff made *no* attempt to redeem the premises, and in the meantime the high bidder "relied on the apparent validity of the sale by taking steps to protect its interest in the subject property by

purchasing insurance, paying property taxes and assuming responsibility for maintenance and utility expenses." *Id*., 757. This Court found the equities in the bidder's favor not so much because of the timing, but because of what the bidder had done in the meantime in reliance on the plaintiff's failure to act. In contrast, defendant here did not change position based on a failure by plaintiff to pursue his rights – in fact, even if plaintiff has no rights, he was vigorously attempting to pursue what he believed were his rights, and defendant was aware of that fact. Plaintiff's failure to commence the instant action until after the redemption period had expired is simply not enough to warrant application of the doctrine, particularly where defendant itself has not seen fit to argue or even plead it.

The majority also deems this action a collateral attack on the prior district court proceedings, contending that plaintiff sought relief there and "lost." As far as I can determine, plaintiff did not actually "lose," he was simply denied the opportunity to be heard at all. The circuit court opinion from the prior proceedings explains that plaintiff Ursery actually attempted to bring the present claims in the district court proceedings, but the district court refused to entertain them as being outside its jurisdiction. The district court also refused to remove the mortgage company's (defendant in this case) claims because Ursery (plaintiff in this case) failed to show that the mortgage company's claims were outside the district court's jurisdiction. The circuit court in this case observed that "the District Courts are very cavalier especially in Detroit about doing that" but "[h]owever, it is here. It is properly before me."

In other words, plaintiff *actually tried to litigate these issues* in the prior proceedings. He was refused a hearing on them in the original forum and was essentially told that the only way he had to be heard was to do precisely what he is now doing: bringing a separate action. This is not an attempt to relitigate issues that were or could have been brought in a prior action. Nor is this a case where a party is seeking to avoid litigating a matter in one forum by commencing suit in another. This is a case where a party attempted to bring these issues in the first action but was prevented from doing so and has apparently spent much of the intervening time trying to be heard. The collateral attack doctrine is intended to prevent a party from attacking a judgment where the party had the opportunity to use proper procedures in the initial proceeding, but did not do so. Plaintiff has not yet been afforded that opportunity.

I do not believe summary disposition was appropriate as to plaintiff's claims for breach of contract, breach of oral argument, and MCPA claims.

/s/ Alton T. Davis